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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-584

PETER J. MARTINO and WARREN LUKE MARTINO, a/k/a "WIMPY" MARTINO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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and

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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. ———

PETER J. MARTINO and WARREN LUKE MARTINO, a/k/a "WIMPY" MARTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners Peter J. Martino and Warren Luke Martino, a/k/a "Wimpy" Martino pray that a writ of certiorari issue to review the judgment, opinion and order denying the petition for rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 27, 1972, and on September 11, 1972, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix (Ap. A, pp. 1-2). The judgment and commitment entered by the United States District Court for the Southern District of Mississippi is unreported and appears in the appendix (Ap. E, pp. 9-11).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 27, 1972 (Ap. B, p. 3). A supplemental petition for rehearing and for rehearing en banc was considered by the Court and denied on September 11, 1972 (Ap. C, p. 5). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

WHETHER A VERDICT FORM AND INSTRUCTIONS DIRECTING THE JURY TO DETERMINE THE INNOCENCE OR GUILT OF DEFENDANTS *JOINTLY* AS TO EACH COUNT AND PRECLUDING THE JURY FROM JUDGING EACH DEFENDANT *INDIVIDUALLY* UPON EACH SEPARATE COUNT CHARGED IN THE INDICTMENT VIOLATES DUE PROCESS OF LAW AND THE FUNDAMENTAL RIGHT TO A FAIR TRIAL.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment: "No person shall * * * be deprived of life, liberty or property, without due process of law * * *."

STATEMENT OF THE CASE

Petitioners Peter Martino and Warren Martino were charged jointly in a three-count indictment. Count I charged both petitioners with a conspiracy to violate the interstate travel or transportation in aid of racketeering enterprises statute; Count II and III charged both petitioners with substantive violations of the interstate travel or transportation in aid of racketeering enterprises statute.[1]

Briefly, the gist of the conspiracy and substantive counts were that Peter J. Martino and Warren Luke Martino operated a gambling club in Biloxi, Mississippi where interstate wire facilities of Western Union were used in promoting and carrying on gambling activities alleged to be in violation of a Mississippi gambling statute. R. 1-3.[2]

Without burdening the Court with a detailed statement of the facts, it is sufficient to state that in the period covered by the conspiracy, to wit: July 1, 1962, until March 19, 1966, and in the periods named in the substantive counts, to wit: December 11, 1965, and March 12, 1966, respectively, strong and convincing evidence was adduced that Warren Martino was promoting and carrying on an alleged unlawful activity involving gambling in Biloxi, Mississippi, using an interstate facility. T. 55, 69, 82, 94, 101, 102, 124, 125, 146-149, 151, 194-199, 297.

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[1]Sections 2 (Principal), 371 (Conspiracy) and 1952 (Interstate Travel or Transportation in Aid of Racketeering Enterprises) of Title 18, United States Code, are set forth in Appendix D, *infra*.

[2]The reference to the record-on-appeal containing the pleadings will be by the use of the symbol "R"; reference to the record-on-appeal containing the transcript of the trial proceedings will be by the use of the symbol "T".

On the other hand, evidence adduced as to Peter Martino's involvement was barely sufficient to establish his guilt. The witnesses testified that they never saw Peter Martino at the gambling club. T. 82, 115, 129-131, 147, 201, 261, 262, 310. Further the witnesses testified that the "club" was managed and run by Warren Martino and a Joe Tarrento. T. 31, 81, 82, 115, 129-131, 145-151, 197-199, 201.

Respondent's entire case against Peter Martino on the conspiracy and substantive counts consisted of an FBI agent's testimony that Peter stated at the time of his arrest that he would sue Western Union for selling him something illegal. T. 205, 206.

CHARGE TO THE JURY

The District Judge precluded the 12-member jury from determining the individual innocence or guilt of each petitioner on each count by charging as follows:

(T. 378)

> "You understand you have got three counts. You will decide as to the guilt or innocence of these defendants on these three counts, so let's talk about count one. You have got to consider them separately anyway. If your determination, if all twelve of you say that these defendants are not guilty of the offense charged in count one the form of your verdict as written out on this verdict as it will be 'We, the Jury, find the defendants to be not guilty on count one of the indictment', in which event you would put your x mark in the rectangle opposite that form of verdict as to count

one. On the other hand, if your unanimous determination is that these defendants are guilty on count one the form of your verdict would be 'We, the Jury, find the defendants to be guilty as charged of the offense stated in count one of the indictment', in which event it would be necessary for you to put your x mark in the rectangle opposite that form of verdict, and so likewise with respect to count two and count three of this indictment."

At the conclusion of the charge, the jury was handed a verdict form which in pertinent part reads as follows:

"JURY VERDICT"

(R. 124; Ap. G)

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 3 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 3 OF THE INDICTMENT."

The jurors returned the form to the court marking an "X" and writing the word "Yes" to the left of the second, fourth and sixth sentences of said verdict.

Warren Martino was sentenced to 18 months on Count I, 18 months on Count II to be served after the completion of the sentence on Count I and five years probation on Count III. R. 136. Peter Martino was sentenced to two years on Count I, two years on Count II, to be served after the completion of the sentence on Count I and five years probation on Count III. R. 135. Ap. E.

Petitioners' trial counsel did not object to the form of the verdict or the District Judge's instruction. On appeal petitioners' trial counsel did not assert the patently, plain error affecting the substantial rights of petitioners. The grave impropriety committed by the District Judge in denying petitioners the right to have their individual innocence or guilt determined by the jury was raised initially in a supplemental petition for rehearing en banc in the Court of Appeals upon appearance of the undersigned counsel in the latter Court.[1]

[1]A motion for leave to file a supplemental petition for rehearing en banc out of time was granted by the Court of Appeals. (Ap. F, p 13).

It was alleged, *inter alia*, in the supplemental petition for rehearing en banc that the District Judge's plain and grave error denied petitioners due process of law and the fundamental fairness inherent in a trial. (Ap. G)

After considering the supplemental petition for rehearing for approximately three months, the Court of Appeals sanctioned the departure by the lower court from the accepted and usual course of judicial proceedings by denying the petition (Ap. C, p. 4).

REASONS FOR GRANTING THE WRIT

THE DECISION, JUDGMENT AND ORDER DENYING THE SUPPLEMENTAL PETITION FOR REHEARING BELOW APPROVING THE DETERMINATION OF INNOCENCE OR GUILT OF CODEFENDANTS BY THE JURY IN A CRIMINAL TRIAL BASED UPON A CONCEPT OF JOINT CRIMINAL RESPONSIBILITY RATHER THAN ON INDIVIDUAL RESPONSIBILITY VIOLATED PROCEDURAL DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

A. *The Court of Appeals has departed so greatly from the accepted and usual course of judicial proceedings in sanctioning the lower court's concept of joint criminal responsibility rather than individual responsibility that this Court should exercise its supervisory power to apply the proper standard, viz., the jury must judge each defendant separately upon each count charged in an indictment.*

b. *The decision below conflicts with a decision of this Court and other Courts of Appeals as to the requirement of separate verdicts by the jury under proper instructions as to the guilt or innocence of each defendant on each count.*

Without burdening the Court with a reiteration of the instruction and verdict form set forth in the statement of the case, *supra*, it cannot be contradicted that the District Judge severely deprived petitioners of procedural due process and the right to a fair trial by precluding the jurors from considering and deliberating the innocence or guilt of each defendant separately as to each count. It needs no extended citation of authority to support the principle that a basic cornerstone of our criminal jurisprudence is the concept that criminal responsibility is rooted in the individual, his intentions, his motives and his conduct. E.g., *United States v. Agueci*, 310 F.2d 817, 829 (2 Cir. 1962).

Therefore, the trial judge has the burden, in order that justice be applied to the individual rather than to the group, to impress upon the jury the need for judging each defendant separately upon each separate count charged in the indictment.

The great danger in any criminal trial involving multiple defendants is the risk that the jury might transfer incriminating evidence against one defendant to another defendant. Here, the jury was expressly directed to consider the guilt of the defendants jointly and the verdict form compelled such a consideration.

It is so basic to procedural due process and fundamental fairness that a finding of not guilty or guilty of an accused should never control the verdict as to another defendant, as the jury must give separate, personal consideration to the case of each individual defendant.

It is contended that both petitioners were deprived of their Constitutional Right to procedural due process and were likewise deprived of fundamental fairness; a fortiori, Peter Martino was prejudiced since the overwhelming evidence against his brother, Warren and the latter's partner, Tarrento, was considered against him pursuant to the instructions and verdict form calling for a verdict based on joint criminal responsibility.

Inasmuch as the District Court and, in turn, the Court of Appeals have so far departed from the accepted and usual course of judicial proceedings, or the appellate court has so far sanctioned such a departure by the lower court, this Court should grant the petition and summarily reverse the decision, judgment and order denying the supplemental petition for rehearing in an exercise of this Court's supervisory powers to formulate and apply proper standards for enforcement of criminal laws in the Federal courts. *Marshall v. United States*, 360 U.S. 310, 3 L.Ed.2d 1250, 79 S.Ct. 1171.

Furthermore, the decision, judgment and order denying the supplemental petition for rehearing below conflicts with a prior decision of this Court. In *Blumenthal v. United States*, 332 U.S. 539, 92 L.Ed. 154, 68 S.Ct. 248, the Court approved the requirement that the "'guilt or innocence of each defendant must be determined by the

jury separately. Each defendant has the same right to that kind of consideration * * * as if he were being tried alone.'"

Likewise the decision below directly collides with decisions of the Second and Third Circuits holding: "[T]here must be separate verdicts by the jury, under proper instructions from the Court, as to the guilt or innocence of each defendant on each count if a judgement of conviction is to stand * * *." *United States v. Crescent-Kelvan Co.*, 164 F.2d 582, 589 (3 Cir. 1947); *United States v. Agueci*, *supra*.

As conceded in the statement of the case, no objection to the trial court's instruction or verdict form was made by petitioners' trial counsel as required by Rule 30, Federal Rules of Criminal Procedure. Notwithstanding, Rule 30 must be read also in connection with Rule 52(b), allowing plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the trial court. *Bearden v. United States*, 403 F.2d 782, 786-7 (5 Cir. 1968). In *Bearden*, the Fifth Circuit held that Rule 30, Federal Rules of Criminal Procedure precluding assignment of error as to any portion of a jury charge not objected to before the jury retires, will not bar invocation of Rule 52(b) where instructions have resulted in a miscarriage of justice.

Certainly, a Court of Appeals should always exercise a willingness to carefully scrutinize the record for plain errors and serious departures from the usual course of judicial proceedings notwithstanding that such error is raised for the first time on appeal.

The foregoing rules are applicable notwithstanding that the question fully developed in this Court was raised for the first time on appeal in a supplemental petition for rehearing. Cf. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 10 L.Ed.2d 915, 928, 83 S. Ct. 1715. Further the question is proper for consideration although the Court of Appeals recited cursorily that the petition for rehearing has been denied. If any doubt exists as to the Court of Appeals having considered the question raised in this petition, the Court should defer consideration of the merits *vel non* of the petition for a reasonable time in order that petitioners be given an opportunity to procure a certificate from the Court of Appeals as to whether its judgment rested on a full review of the question raised herein and in the supplemental petition for rehearing.

More to the heart of the issue, the *gross departure* from Constitutional standards and fundamental proceedings in a criminal trial is *patent on the face of the record.* For example, the jury verdict appears at page 124 of the record-on-appeal and on its face constitutes such plain error affecting the substantial rights of the petitioners that the Court of Appeals should have noted and corrected such a flagrant error. Certainly the appellate court was given the opportunity to correct the lower court when its attention was specifically directed to the egregious error in the supplemental petition for rehearing. No technical, procedural argument should deter this Court from exercising its jurisdiction, or worse still, be invoked by this Court to defeat review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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and

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Miami Beach, Florida

By _____
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 this ____ day of October, 1972.

_____

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-2371

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PETER J. MARTINO and WARREN LUKE MARTINO, a/k/a "WIMPY" MARTINO,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

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(April 27, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: We have considered the appellants' contentions 1) that the district court erred in refusing their lawyer's request to leave the courtroom to confer with the appellants after the voir dire examination of the jurors; 2) that the court improperly restricted the scope of the appellants' voir dire examination of prospective jurors; 3) that the court erred in admitting certain items of evidence allegedly prejudicial to appellants; 4) that the court committed reversible error in referring to "statutes" (in the plural) allegedly violated by the appellants, and in condoning similar reference by the Government, though in fact the appellants were charged with violating only a single provision of Mississippi law; 5) that the evidence was insufficient to sustain a verdict of conviction and the denial of a motion for acquittal; 6) that the court erred in permitting FBI agent Files to testify as to an allegedly inculpatory statement made by Peter J. Martino shortly after his arrest in the presence of counsel and after he had been advised of his rights; 7) that the district court made prejudicial remarks concerning the appellants in the presence of the jury; 8) that the court erred in overruling the appellants' motion to dismiss the indictment because it charged the appellants with bookmaking, allegedly not a violation of Mississippi law; 9) that the court erred in denying the appellants' motion for a bill of particulars; 10) that the court erroneously failed to instruct the jury as to the elements of the Mississippi law which the appellants were charged with violating. None of these contentions has sufficient merit to warrant further discussion.

AFFIRMED.

APPENDIX B

[TITLE OMITTED]

Appeal from the United States District Court
for the Southern District of Mississippi

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 27, 1972

Issued as Mandate:

APPENDIX C

[TITLE OMITTED]

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

[Filed September 11, 1972]

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

18 U.S.C. §2. **Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371. **Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1952. **Interstate and foreign travel or transportation in aid of racketerring enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX E

[TITLE OMITTED]

Judgment and Commitment (Warren Martino)

On this 13 day of July, 1971, again came the attorney for the government and the defendant appeared in person and by his attorneys, Edward G. Tremmel and Jules A. Schwan, and upon arraignment on March 24, 1967, the defendant entered a plea of not guilty.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty by a jury on July 6, 1971, has been convicted of the offense of violating Sections 1952, 2 and 371, Title 18, United States Code: Unlawfully using and aiding and abetting and causing the use of facilities in interstate commerce with intent to carry on and facilitate the carrying on of unlawful gambling activities in Mississippi, and conspiracy to do so, as charged in Count I, II and III of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count I 18 months, Count II 18 months. The sentence on Count II to be consecutive to and to commence at the expiration of the sentence imposed on Count I, making a total sentence of 36 months to be served.

It is Adjudged that as Count III, the imposition of sentence be suspended and defendant placed on probation for a period of five years. Said probation to commence after release from the service of sentences imposed on Counts I and II.

It is further Adjudged that the defendant be furnished with all necessary medical and hospital attention as is needed.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ JUDGE HAROLD COX
UNITED STATES JUDGE

ROBERT C. THOMAS, CLERK

Judgment and Commitment (Peter J. Martino)

On this 18 day of July, 1971, again came the attorney for the government and the defendant appeared in person and by his attorney, Edward G. Tremmel and Jules A. Schwan, and upon arraignment on March 24, 1967, the defendant entered a plea of not guilty.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty by a jury on July 6, 1971, has been convicted of the offense of violating Sections 1952, 2 and 371, Title 18, United States Code: Unlawfully using and aiding and abetting and causing the use of facilities in interstate commerce with intent to

carry on and facilitate the carrying on of unlawful gambling activities in Mississippi, and conspiracy to do so, as charged in Counts I, II and III of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count I 2 years, Count II 2 years. The sentence on Count II to be consecutive to and to commence at the expiration of the sentence imposed on Count I, making a total sentence of 4 years to be served.

It is Adjudged that as Count III, the imposition of sentence be suspended and defendant placed on probation for a period of five years. Said probation to commence after release from the service of sentences imposed on Count I and II.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ JUDGE HAROLD COX
UNITED STATES JUDGE

ROBERT C. THOMAS, CLERK

APPENDIX F

[TITLE OMITTED]

Filed June 23, 1972

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Appellants for leave to file a supplemental petition for rehearing en banc if same is allowed to be filed out of time is hereby granted.

APPENDIX G

Excerpt from Supplemental Petition for Rehearing in Banc.

14. Then the Court committed a judicial act affecting the substantial rights of both defendants, by denying to both defendants the Constitutional requirements of due process of law and the right to a fair trial. The Court committed this plain and grave error by precluding the jurors from deliberating and considering the innocence or guilt of each defendant separately as to Counts I and Counts II and III by charging as follows:

> "You understand you have got three counts. You [T 378] will decide as to the guilt or innocence of these defendants on these three counts, so let's talk [T 379] about count one. You have got to consider them separately anyway. If your determination, if all twelve of you say that these defendants are not guilty of the offense charged in count one the form of your verdict as written out on this verdict as it will be 'We, the Jury, find the defendants to be not guilty on count one of the indictment', in which event you would put your x mark in the rectangle opposite that form of verdict as to count one. On the other hand, if your unanimous determination is that these defendants are guilty on count one the form of your verdict would be 'We, the Jury, find the defendants to be guilty as charged of the offense stated in count one of the indictment', in which event it would be necessary for you to put your x mark in the rectangle opposite that form of verdict, and so likewise with respect to count two and count three of this indictment."

15. The printed verdict from filled in and signed by the jurors is found at page 124 of the record and reflects that no verdict could have been returned by the jury as to the guilt or innocence of Peter Martino or Warren Luke Martino, individually, as to any of the counts [R 124].

16. Fundamental fairness requires that where there are multiple counts in an indictment and multiple defendants, "there must be separate verdicts by the jury, under proper instructions from the Court, as to the guilt or innocence of each defendant on each count if a judgment of conviction is to stand ***." United States v. Crescent-Kelvan Co., 3 Cir. 1947, 164 F.2d 582, 589.

17. It is contended that both defendants were prejudiced by the District Judge's plain error; but, a fortiori, Peter Martino was gravely prejudiced by not having his guilt or innocence submitted to the jury on each count of the indictment where the evidence against him was not overwhelming on either the conspiracy or substantive counts.

18. It is conceded that the defendants' trial counsel did not make any objection to the court's instructions as required by Rule 30, Federal Rules of Criminal Procedure. Notwithstanding, Rule 30 must be read also in connection with Rule 52(b), allowing plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the trial court.

19. This Court has stated that although it has many times refused to permit error to be raised for the first time on appeal, it has also consistently emphasized a will-

ingness to carefully scrutinize the record for plain errors affecting substantial rights which are noticeable under Rule 52(b), **supra**, notwithstanding lack of objection. **Bearden v. United States**, 403 F.2d 782, 786, 787 (5 Cir. 1968). The Court held further that Rule 30, Federal Rules of Criminal Procedure precluding assignment of error as to any portion of a jury charge not objected to before the jury retires, will not bar invocation of Rule 52(b) where instructions have resulted in a miscarriage of justice. **Bearden v. United States, supra.**

Wherefore, because of the reasons and authorities set forth in this supplemental petition for rehearing in banc, it is requested that the Court grant said petition.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-584

PETER J. MARTINO AND WARREN LUKE MARTINO, A/K/A "WIMPY" MARTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioners Peter J. Martino and Warren Luke Martino were convicted of two counts of having used interstate telegraph facilities to promote gambling activities in violation of 18 U.S.C. 1952 and 2 (Counts II and III) and of one count of having conspired to use the wire facilities in violation of 18 U.S.C. 371 (Count I). Petitioner Peter J. Martino was sentenced to two years' imprisonment on Counts I and II, to run consecutively. Petitioner Warren Martino was sentenced to eighteen months' imprisonment on Counts I and II,

to run consecutively. Additionally, each received a suspended sentence and five years' probation on Count III. The court of appeals affirmed (Pet. App. 1-3) and subsequently denied a petition for rehearing *en banc* (Pet. App. 5).

The evidence adduced at trial showed that the 406 Club, located in Biloxi, Mississippi, was operated by petitioners as a bookmaking and gambling operation from July 1962 to March 1966 (Tr. 30-48, 53-56, 81-82, 204-205).[1] The activities conducted in the club included card games and wagering on horse races and other sporting events (Tr. 56-58). During this time and continuing until January 1970, a Western Union telegraph machine was installed on the premises. The machine, commonly called a "sports ticker," relayed sporting results from Chicago, Illinois, to the club (Tr. 30-48). Sports scores received on the telegraph tape were posted on a board and the tape itself was used at the betting window for determining winners (Tr. 104, 118, 145-151, 182-188, 197-198, 211-212, 255).

In the operation of the business, petitioner Peter Martino arranged for the printing of football and baseball parlay sheets (Tr. 294-308), and Warren Martino paid the monthly rent (Tr. 88-90). Additionally, at various times, Warren Martino took bets and made payments to the winners (Tr. 69, 94, 102-104, 125, 188). At one time, he also communicated with Western Union concerning a breakdown in the equipment (Tr. 35).[2]

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[1] "Tr." refers to the transcript of the trial proceedings, a copy of which we are lodging with the Clerk of this Court.

[2] It was also shown that when Peter Martino was arrested, he stated in the presence of his attorney, "I'll sue them, I hope I am

Petitioners now claim that they were denied due process and the right to a fair trial because the verdict form submitted to the jury did not state that the jury was to consider each petitioner separately in determining guilt or innocence on each of the three counts. They also contend that the district court's instructions similarly precluded the jury from making a separate finding of guilt or innocence for each petitioner.[8] The record discloses that petitioners expressed their satisfaction with the instructions to the jury and raised no objection to the verdict forms (Tr. 380-381). Moreover, the contentions raised here were presented to the court below for the first time on a petition for rehearing. Under these circumstances, consideration

convicted, I'll sue Western Union for selling me something illegal." (Tr. 204-205).

[8] The district court charged (Tr. 378-379):

> Now a form of verdict has been prepared for your convenience and use in this case. It is not complicated, but I will make some brief explanation of it to you. You understand you have got three counts. You will decide as to the guilt or innocence of these defendants on these three counts, so let's talk about count one. You have got to consider them separately anyway. If your determination, if all twelve of you say that these defendants are not guilty of the offense charged in count one the form of your verdict as written out on this verdict as it will be "We, the Jury, find the defendants to be not guilty on count one of the indictment", in which event you would put your X mark in the rectangle opposite that form of verdict as to count one. On the other hand, if your unanimous determination is that these defendants are guilty on count one the form of your verdict would be "We, the Jury, find the defendants to be guilty as charged of the offense stated in count one of the indictment", in which event it would be necessary for you to put your X mark in the rectangle opposite that form of verdict, and so likewise with respect to count two and count three of this indictment.

of the issue by this Court is unwarranted. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362-363, n. 16; *Adickes* v. *Kress and Co.,* 398 U.S. 144, 147, n. 2. In any event, the evidence produced at that trial clearly established petitioners' guilt as joint participants in the illegal gambling venture, and the jury convicted each of them not only of substantive counts but also of conspiracy. Since the jury was wholly justified in returning a guilty verdict as to each petitioner on each count, the nature of the verdict forms did not prejudice petitioners.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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